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IN THE

# Supreme Court of the United States

October Term, 1971

No. 71-563

JAMES R. ROHRBAUGH, *et al.*
*Petitioners,*

v.

THE PRESBYTERY OF SEATTLE, INC., *et al.*
*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

# REPLY BRIEF OF PETITIONERS

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## SUBJECT INDEX


| | Page |
|---|---|
| Preface | 1 |
| Statement of the Case | 1 |
| Conclusion | 12 |


## TABLES OF AUTHORITY

### Table of Cases


| | |
|---|---|
| *Craigdallie v. Aikman*, 2 Blight 529 (1820) | 3 |
| *First English Lutheran Church v. Evangelical Lutheran Synod of Kansas*, 135 F.2d 701 (1943) | 5 |
| *Maryland and Virginia Churches v. Sharpsburg Church*, 396 U.S. 267 | 5 |
| *Presbyterian Church in the United States v. Hull Memorial Church*, 224 Ga. 61, 159 S.E.2d 690 (1968) reversed 393 U.S. 440 (1969) | 2, 3, 4, 5 *et. seq.* |
| *Watson v. Jones*, 13 Wall 679 (1871) | 2, 8 |


### Other Authority


| | |
|---|---|
| 54 Iowa Law Review 899 (1969) | 11 |
| XXVII Washington and Lee Law Review, 44-69 (1970) | 8, 11 |

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## PREFACE

After failing to do so in November, the respondents have now, under the court's January order, filed an answer to our Petition.

At the outset we suggest, after a careful reading of the Respondents' Brief in Opposition, that respondents' arguments in themselves furnish a convincing reason for the granting of the Writ.

## STATEMENT OF THE CASE

We shall make first a general Reply and then specific ones.

Respondents (p. 2) completely evade, with a claim of

irrelevancy, a very uncomfortable fact for them. The case was tried below before *Hull*, 393 U.S. 440 (1969) by both sides on the issue of "substantial change in doctrine", which then appeared relevant. 76 C.J.S. Religious Societies, §70, p. 849, quoted on p. 9 of our Petition; *Presbyterian Church in the United States v. Hull Memorial Church*, 224 Ga. 61, 159 S.E. 2d 690 (1968), reversed 393 U.S. 440 (1969).

The trial court found that there was:

> ". . . abundant proof that substantial changes had been made in the doctrine of the church, that the Confession of 1967 departed from its historic, centuries old Presbyterian position and Statements of Faith, and that political and social pronouncements were made, to all of which loyal, conservative members of the church, and particularly the pastor and members of the Laurelhurst church could not in good conscience abide." Pet. Appendix A, p. A-2.

The trial court delayed until the first *Hull* decision in the Georgia case, 393 U.S. 440 (January 27, 1969), but did not wait for the second Georgia decision below on remand which awarded title to the local church as against the National Church, and the consequent second *Hull* decision, 396 U.S. 1041, denying certiorari.

Then, although holding that there was "abundant proof" of substantial changes in doctrine by the national church, the trial court concluded that, after *Hull*, this issue was not available, that the Washington State Supreme Court had followed *Watson v. Jones*, 13 Wall. 679 (1871) in several earlier cases, that as trial judge he should follow them, and that, in his view, the first *Hull* decision made *Watson v. Jones* applicable to this case. Petition, Appendix A.

Because of his knowledge of the facts in the record before him, he arrived at this conclusion "reluctantly". He said (Petition, Appendix A, p. A-9):

> "Reluctantly, for my sympathies are with Pastor Rohrbaugh and his congregation, I must conclude that plaintiffs are entitled to the relief sought, and it is so ordered."

His reluctance was based on the fact that he knew that for almost two centuries courts of equity in England and the United States (prior to *Hull*, 393 U.S. 440, (1969)) in church property disputes have sustained the position of those who adhered to doctrine as being in the right, and those who departed from doctrine as being in the wrong, regardless of majority or minority. This was finally authoritatively decided by the House of Lords in *Craigdallie v. Aikman*, 2 Blight 529 (1820).

The consequence of the lower court's decision and its affirmance by the Supreme Court of the State of Washington is that the church property is being given to the party in the wrong under traditional equitable principles and the property denied to those in the right under those principles.

To the end of time there can be no question as to the relative equities of the parties, established at the trial in 1968, prior to *Hull* (January, 1969).

This can never be "irrelevent" in the context of justice, although no longer available under *Hull* as a basis for adjudicating property rights.

The end result of the decisions below, unless reviewed by this Court, is to enable the National Church (represented here by the Presbytery) to force on the Lamrelhurst

Church and other dissenters similarly situated, the Confession of Faith of 1967, or else give up the church property. This is, with a vengeance, "establishment" of a confession and "establishment" of a church by a civil court, which the First Amendment forbids.

The trial court's Finding VI (Petition, Appendix D, p. A-26) expressly shows that the controversy arose out of, and turned on the objections to the General Assembly's new "Confession of Faith of 1967".

No other conclusion can be drawn except that the decision below "establishes" the Confession of 1967 and the National Church in violation of the First Amendment.

Although the "change of doctrine" issue is not available since *Hull* as a basis for adjudicating title and possession, fortunately the "neutral principles of law developed for use in *all* property disputes" (Italics supplied) required by *Hull* and applicable to this case, necessitate a reversal of the judgment below, or at least establish worthiness of a hearing in this Court.

It is manifest from a cursory reading of the trial court's Findings of Fact and Conclusions of Law (Petition, Appendix D) especially the Findings III, IX, X, XII (A-27, A-28) and Conclusions of Law II, III, IV (A-30, A-31), that the trial court, and the State Supreme Court on appeal, unconstitutionally inquired in detail into, and adjudicated, matters of church law and practice, which the First Amendment, as construed in *Hull*, unqualifiedly forbids.

Let us take, for example, Finding XII (Petition, A-28) and Conclusion IV (Petition, A-31) that under the Con-

stitution and Book of Order there is "no provision . . . for a congregation or church to withdraw from the denomination. There are provisions for persons to withdraw individually;" and that "the acts of defendants in attempting to withdraw from the denomination . . . . are in violation of the rules, procedures and laws of the United Presbyterian Church, in the United States of America."

How could then be made a more detailed investigation of "religious doctrine and practice", *Hull*, 343 U.S. 440, 449, or a more "extensive inquiry into religious polity", (Mr. Justice Brennan, concurring in the companion case to *Hull*, namely, *Maryland and Virginia Churches v. Sharpsburg Church*, 396 U.S. 267, 370)?

Actually, if one could constitutionally make this inquiry into internal church polity (which one cannot), it would be clear that the failure to prohibit congregations from withdrawing does indeed permit withdrawal.

Even prior to *Hull*, the rule was succinctly stated by the Tenth Circuit as far back as 1943 in *First English Lutheran Church v. Evangelical Lutheran Synod of Kansas*, 135 F.2d 701, 702 (1943):

> "Extended argument is submitted in respect of the power of the church to withdraw from the Synod of Kansas without its consent. A civil court will not review acts of a religious organization relating solely and exclusively to an internal ecclesiastical affair for the sole purpose of asserting whether they are regular or in accordance with the polity, discipline, or usages of the organization." (citing, among others, *Watson v. Jones*, on which Respondents' counsel rely.)

The same ruling was made by Maryland's highest court. (254 A.2d 162, 170 (1969) quoted on p. 18 of our Peti-

tion, appeal dismissed for want of a substantial federal question, 396 U.S. 367 (1970)).

The foregoing survey of the trial court's Findings and Conclusion is, in essence, a complete Reply to Respondents' Brief in Opposition, and convincingly establishes deep inquiries into "religious doctrine and practice"—all major violations under *Hull* of First Amendment principles—certainly, we suggest, sufficiently major to justify a review by this Court.

However, we shall try to add some brief pointed, specific replies.

## I.

*Respondents' Brief, p. 15-17, takes the untenable position that* Hull *allows several alternatives to "neutral principles of law" in determining church property disputes.*

As a premise, we read the language of *Hull* to *require all* church property disputes to be settled *exclusively* by "neutral principles of law."

> "And there are neutral principles of law, developed for use in *all* church property disputes, which can be applied without establishing churches to which property is awarded". 393 U.S. 440, 449) Italics supplied.

We construe the use of secular principles to be an absolute requirement because of the word "all", which we underline. Respondents' counsel, on the other hand, contrue it to be permissive by underlining on Respondents' Brief, p. 15, the word "can", and they pose alternative approaches, including the "Watson approach" which they must defend because used below, even though they recognize that it requires a court to determine whether the church organizational structure is hierarchical and ulti-

mately requires a court to confirm an ecclesiastical decision.

Respondents say (p. 16), not even timorously, that the Maryland Court had "incorrectly" interpreted *Hull* as *re-requiring* that civil courts dispose of all church property disputes upon "neutral principles of law". This is *ipse dixit*, without foundation. On the opinion filed by the Maryland Court, this court dismissed, for want of a substantial federal question, 396 U.S. 367, which is a decision on the merits. The separate concurring opinion of three Judges (Justice Brennan writing, and Justices Douglas and Marshall concurring) even though a helpful discussion (it is helpful to us) is not the decision of the nine-man Court and cannot, as erroneously urged by counsel, modify the *absolute* language of *Hull*. That can be done only by the entire Court, if and when it elects to review this case.

This construction of *Hull*, that there are alternatives to "neutral principles of law" in deciding church property disputes, runs all through Respondents' argument. We submit that it is palpably erroneous, and that this contention alone justifies a hearing by the Court to clear up this added confusion about *Hull*.

As we said in the opening paragraph of this Reply, the Respondents' themselves furnish convincing reasons why this Court should hear this case.

Are there, as counsel contend, other than "neutral principles of law, developed for use in *all* church property disputes"? If so, the churches of the United States anxiously await an authoritative decision.

Counsel rests on the proposition that the national church

is an hierarchical church. They even got the trial court (over denial in the Answer which Respondents admit (Respondents' Brief, p. 29) raised the issue) to make Findings III and IV (Petition, A-24, A-25) that it is an hierarchical church; and the State Supreme Court followed along (Petition, Appendix B., p. A-11 and A-15). To do this, this trial court had to examine the internal religious structure of the church, as set forth in its Book of Order. Exhibit 1. The Book of Order is admittedly a religious book. See excerpts in Petition, Appendix F, pp. A-37, A-38.

We think this determination, derived from an examination of the internal religious structure of the church in its Book of Order, violates *Hull*, as well as *Watson v. Jones*.

If a trial court may lawfully make such an internal examination of the religious structure of a church in this case, it can do so in any case.

We pointed out below (See Petition, p. 16) that the Court could not constitutionally make the hierarchical determination, admittedly put in issue by our answer (Respondents' Brief, p. 29) and pointed to Professor Casad's comment in XXVII, *Washington and Lee Law Review*, 44-69, where Professor Casad said (p. 68)

> "Mr. Justice Brennan's comment apparently excludes the Watson approach in such cases, for to classify a church as congregational or hierarchical inevitably involves an inquiry into religious law, usage, doctrine or polity."

This warning was ignored below and the First Amendment violated.

## II.

*On page 21, Respondents urge that Respondents would prevail even if "neutral principles of law" were to govern the Washington State Supreme Court's decision.*

They rather lamely point to Article III of the Articles of Incorporation which, in stating object and purpose, indicates that the corporation will maintain" . . . the belief and practice of the United Presbyterian Church of North America . . ."

This, of course speaks as of the time the Articles were filed. It in no way speaks of a later date when, after merger, the national church changed doctrine.

Similarly, they refer to By-Laws adopted January 27, 1959. They again speak as of the time of their adoption, and not as of a later date. This argument is subject to the same fallacy.

The complete answer is, of course, that if this Court follows the locus of title rule adopted by the majority of recent state decisions in their interpretation of *Hull*, and also by the law reviews cited below, the corporate officers and trustees of the Laurelhurst Church selected pursuant to state statute will control the property. Inquiry as to who under church law and polity can also select these officers is forbidden by *Hull*.

The Supreme Court of the State of Washington compounded this error, as pointed out under point V of our Petition (p. 17) that the corporation "by its by-laws is subject to the discipline of the United Presbyterian Church and is governed by a session which must act in accord with that discipline." To make this ruling, the state court had to go into the internal church law and practice to discover the

session, which *Hull* forbids. At 393 U.S. 440, 449, *Hull* specifically prohibits "resolution by civil courts of controversies over religious doctrine and *practice*". The Washington court has unconstitutionally invaded the area of church law and *practice*.

III.

*On page 25, Respondents repeat the contention that the Washington Supreme Court is not required by this Court to rely exclusively on "neutral principles of law".*

We have above pointed out the fallacy of this argument respecting *Hull*, and urged that this claim of Respondents alone should convince this Court to grant the Writ, in order to clarify this issue for churches in this country.

IV.

*Counsel are unhappy (Respondents' Brief, p. 26) with our quotation from the* Yale Law Journal *as set forth on page 14 of our Petition, which says that* Watson v. Jones *is "the most objectionable rule," because it "gives the church plenary power over church property and allows the church to use the courts to enforce its decrees."*

Let us leave aside for the moment the present case in which the court found a "substantial change in doctrine". Let us suppose that a national church, after centuries of contrary belief, rejects the divinity of Christ. Under *Watson* as construed by Respondents and the courts below, the national church can seize control of all church properties, and exclude all dissenters.

Need more be said?

The *Yale Law Journal* points out that the "formal title rule" is the best approach because it involves no consideration of "theology or the administrative rules of the church, but looks solely to the locus of the title."

This salutary approach is the one recently adopted by Maryland, Georgia, Ohio and Indiana, and is supported by 54 *Iowa Law Review* 899, 907 (1969), XXVII *Washington and Lee Law Review* 44-69, especially p. 68 (1970), as well as by the *Yale Law Journal*.

V.

*On page 37 respondents urge that the case is not of national importance.*

We respectfully submit that respondents have convincingly proved exactly the opposite and raised arguments which cry for immediate resolution by this Court for the benefit of all the churches in the United States, including the petitioner, Laurelhurst Church. One can except the Roman Catholic Church, since it is common knowledge that all property titles are in Bishops as corporations sole.

Even limiting the importance to Presbyterian Churches (which, in view of Respondents' claims, one cannot do), the record shows (see Petition, p. 7) that the new "Confession of 1967" was adopted with a substantial dissenting vote. Assuming counsels' figures of 8812 Presbyterian Churches in the National Church, it is reasonable to conclude that (in addition to a number of Presbyterian churches actually litigating and awaiting additional light from this Court) there are probably thousands of unhappy Presbyterian churches waiting in the wings.

Forcing on them the new substantially changed Confession of 1967, on penalty of otherwise losing their churches, is to them an intolerable interference with their freedom of religion under the First Amendment. (See Petition, pp. 17-18).

## CONCLUSION

Unprepared to accept counsel's repeated contention that under *Hull* there are alternatives to "neutral principles of law in resolving church property disputes" (in Respondents' Brief, p. 39, counsel again refer to "three approaches") we respectfully urge (strongly supported, we think, by the Respondents' own arguments) that the problems raised by *Hull* on this record under the First Amendment should by all means be heard by this Court.

If at this juncture the points raised in our Petition are again read and considered, we sincerely trust, in the light of Respondents' unusual claims about *Hull*, that this Court will see the urgent need for review.

We respectfully pray that the Writ of Certiorari issue.

Respectfully submitted,

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